

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO**

UNITED STATES OF AMERICA,

Plaintiff-Respondent,

v.

Nos. CIV 16-0966 JB/SCY
CR 14-1532 JB

ORLANDO ROYBAL,

Defendant-Petitioner.

MEMORANDUM OPINION AND ORDER

THIS MATTER comes before the Court on Defendant-Petitioner's Motion to Withdraw Motion for Appointment of Counsel, filed September 29, 2016 (CIV Doc. 3; CR Doc. 37)("Motion to Withdraw"). Defendant-Petitioner Roybal, who is proceeding pro se, seeks to withdraw his Motion For Appointment of Counsel, filed August 24, 2016 (CV Doc. 1; CR Doc. 35) ("§ 2255 Motion"), which was docketed as a Motion to Vacate, Set Aside, or Correct Sentence Under 28 U.S.C. § 2255, and which sought the appointment of counsel to assist Roybal in challenging his "unconstitutional sentence under the [Armed Career Criminal Act,] as declared by Johnson [v. United States], 135 S. Ct. 2551 (2015)]." § 2255 Motion at 2. Roybal states that he "has decided that it is not in his best interest to proceed with a 2255 at this time, after discussing it with the Federal Defender's Office, and wishes to preserve his right to file at a later time." Motion to Withdraw at 1.

Pursuant to rule 41(a)(1)(A)(i) of the Federal Rules of Civil Procedure, a plaintiff may "dismiss an action without a court order by filing . . . a notice of dismissal before the opposing party serves either an answer or a motion for summary judgment." Rule 12 of the Rules

Governing Section 2255 Proceedings for the United States District Courts (providing that the Federal Rules of Civil Procedure, “to the extent that they are not inconsistent with any statutory provisions or these rules, may be applied to a proceeding under these rules”). The Court will liberally construe Roybal’s Motion To Withdraw Motion as a notice of voluntary dismissal under rule 41(a)(1)(A)(i). See Janssen v. Harris, 321 F.3d 998, 1000 (10th Cir. 2003)(affirming the construction of a pro se letter requesting that a case be dismissed without prejudice as a notice of voluntary dismissal under Fed. R. Civ. P. 41(a)(1)). Plaintiff-Respondent United States of America has not yet filed an answer or a motion for summary judgment, and therefore, Roybal “has an absolute right to dismiss without prejudice and no action is required on the part of the court.” Janssen v. Harris, 321 F.3d at 1000.

IT IS ORDERED that: (i) the Defendant-Petitioner’s Motion to Withdraw Motion for Appointment of Counsel, filed September 29, 2016 (CIV Doc. 3; CR Doc. 37), which the Court considers as a Motion to Vacate, Set Aside, or Correct Sentence Under 28 U.S.C. § 2255, is granted; (ii) the Defendant-Petitioner’s Motion For Appointment of Counsel, filed August 24, 2016 (CIV Doc. 1; CR Doc. 35), is voluntarily dismissed without prejudice; and (iii) judgment is entered.



UNITED STATES DISTRICT JUDGE

Counsel:

Damon Martinez
United States Attorney
Linda Mott
Rumaldo R. Armijo
Assistant United States Attorney
United States Attorney's Office
Albuquerque, New Mexico

Attorneys for the Respondent-Plaintiff

Orlando Roybal
Phoenix, Arizona

Pro se